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plied a shipment of staves on a contract not existing at the time of the original contract, sellers could not maintain trover against the purchaser under a provision in the contract retaining title in the seller.

6. Trover and Conversion (§ 16*)—Right to Possession Essential.—One who had neither actual possession of property nor the right to demand the immediate possession thereof at the time it was disposed of by defendant in violation of contract cannot maintain an action of trover.

[Ed. Note.—For other cases, see 13 Va.-W. Va. Enc. Dig. 248-250.]

Error to Circuit Court, Dickenson County.

Action by S. R. Sutherland and others against E. L. Mullins. Judgment for plaintiffs, and defendant brings error. Reversed.

Chase & McCoy, of Clintwood, for plaintiff in error.

Geo. C. Sutherland, of Clintwood, for defendant in error.

HOOVER et al. *v.* HOOVER.

Nov. 17, 1921.

[109 S. E. 424.]

1. Bastards (§ 13*)—Legitimacy Established if Father at Any Time Unequivocally Recognized Child as His.—The law so favors legitimacy that if, at any time, the putative father unequivocally recognized the child as his, such child is legitimate and the father's heir at law, no matter how often he repudiated his paternity.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 335.]

2. Bastards (§ 12*)—Voluntary Marriage of Parents Inferred from Lack of Haste and Absence of Threats.—Where the father of a child born out of wedlock, did not marry the mother until six weeks after his arrest on a charge of seduction, and no threat, except that of the prosecution itself, was made, nor physical force used, there was an inference that his act was deliberate, and that he intended to legitimate the child; the purpose of the seduction statute being to require the seducer to right his wrong in the interest of his child as well as for the sake of the woman.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 335.]

3. Bastards (§ 6*)—Evidence Held to Show Father's Recognition of Child as His.—In a partition suit involving complainant's legitimacy, evidence held to show that her father, by his conduct, his silence when he should have spoken, and his words, had recognized her as his child.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 335.]

4. Bastards (§ 3*)—Presumptions in Favor of Legitimacy and in Support of Judgment in Doubtful Cases.—Every fair presumption

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

should be indulged in favor of legitimacy, and, in doubtful cases, in support of the judgment of the trial court.

[Ed. Note.—For other cases, see 2 Va.-W. Va. Enc. Dig. 336.]

Appeal from Circuit Court, Rockingham County.

On rehearing. Former opinion reversed, and judgment below affirmed.

For former opinion, see 105 S. E. 91.

C. R. Winfield, of Broadway, and *John T. Harris,* of Harrisonburg, for appellants.

Ward Swank, of Harrisonburg, for appellee.

A. S. WHITE & CO., Inc. *v.* RYAN.

Nov. 17, 1921.

[109 S. E. 426.]

1. Limitation of Actions (§ 195 (4)*)—Burden on Plaintiff to Prove Nonresidence.—In action on contract instituted in March, 1921, where defendant pleaded the three-year statute of limitations and showed that contract was made in August, 1916, the burden was then cast upon the plaintiff to prove the fact of nonresidence of the defendant between such dates.

2. Pleading (§ 339*)—Plea Not Waived by Failure to Call to Attention of Jury.—Where defendant pleaded statute of limitations, and it appeared on trial that limitations had run, the fact that the question of limitations was not specifically called to the attention of the jury did not change the pleadings, and it cannot be inferred therefrom that defendant withdrew or waived his plea of limitations.

Error to Circuit Court, Nelson County.

Action by A. S. White & Co., Inc., against Thomas F. Ryan. Judgment for defendant, and plaintiff brings error. Affirmed.

Caskie & Caskie, of Lynchburg, for plaintiff in error.

LYNCH *v.* COMMONWEALTH.

Nov. 17, 1921.

[109 S. E. 427.]

1. Assault and Battery (§ 48*)—Battery Includes Assault.—A battery accompanies and includes an assault.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 730.]

2. Assault and Battery (§ 48*)—Intended Injury May Be to Feelings or Mind; "Battery."—A "battery" is the unlawful touching of

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